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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SALVADOR ALCANTAR HERNANDEZ, JR., Defendant and Appellant.	E069451 (Super.Ct.No. RIF1604725) OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. (Retired Judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

David R. Greifinger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Lynne G.

McGinnis and Adrian R. Contreras, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Salvador Hernandez got into an argument with his girlfriend (Doe). Doe called the police and reported that defendant had slapped her in the face five times; punched her in the face with his fist; thrown a shoe at her hitting her shoulder; and grabbed her by the hair. At trial, she recanted these accusations insisting she was just angry because she found out that day that defendant had been cheating on her. A BWS[1] expert testified for the People.

Defendant was found guilty of corporal injury upon a spouse or cohabitant resulting in traumatic condition (Pen. Code, § 273.5, subd. (a)). In a bifurcated proceeding, defendant admitted he had suffered one prior serious or violent felony conviction (Pen. Code, §§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). Defendant was sentenced to serve four years in state prison.

On appeal, defendant claims the trial court failed to give a limiting instruction sua sponte advising the jury on the use of expert testimony to explain Doe's behavior in recanting her testimony, and not for deciding whether the allegation of domestic violence was true. We affirm the judgment.

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[1] The Evidence Code uses the phrase "intimate partner battering and its effects" to refer to what was formerly known as "battered women's syndrome." (§ 1107, subd. (f).) It is referred to by both names in this case and we will refer to it as "BWS."

FACTUAL AND PROCEDURAL HISTORY

A. DOE'S PRETRIAL STATEMENTS

Doe was 23 years old at the time of trial. She had dated defendant for over four years prior to June 2016; they were no longer dating. They had three children together, ages four years old, two years old and 11 months; she was pregnant at the time of the incident. They all lived with defendant's parents in Riverside.

Riverside Police Officer Vincent Thomas was on patrol on June 11, 2016, when he was dispatched to a domestic violence call at a house in Riverside. He was dispatched around 10:51 a.m. When he encountered Doe, she was upset, red-eyed and crying. She had a welt on one of her cheeks. Officer Thomas took photographs of the injury. The injury appeared more prominent on that day than depicted in the photograph.

Doe told Officer Thomas that defendant had caused the injury to her cheek. She never told him that she received the injury from one of her children. Officer Thomas recorded the interview with Doe when he arrived at the call; it was played for the jury.

Doe told Officer Thomas that she had reported to the police one prior incident of domestic violence between her and defendant. There were five other incidents that she did not report. That morning, defendant, Doe and their children were in their bedroom. She and defendant were arguing because either she did not give one of their children medicine so defendant could sleep, or refused to give him medicine. Defendant threw a tennis shoe at her and hit her in the shoulder. It did not leave a mark.

Defendant pulled her hair and knocked her to the ground. He slapped her in the face five or six times and he hit her one time with his fist while she was on the ground.

Defendant tried to take her cellular telephone but she was able to get it from him to call the police. Officer Thomas asked Doe if she wanted to prosecute defendant and she responded, "Yes. There's already been too many times and I don't think he's gonna change . . . if I don't do it." She refused an ambulance.

Doe demonstrated to Officer Thomas how she tried to block the blows from defendant. Officer Thomas described Doe's actions when defendant was hitting her. She raised up her arms to protect her face. Doe had no other visible marks on her face other than the one on her cheek. Doe did not want any medical care. There were no marks on Doe's arms from blocking the blows from defendant. Defendant had no marks on his hands. Doe had no marks on her shoulder.

The 911 call made by Doe on June 11, 2016, was played for the jury. Doe gave the dispatcher her address. She stated "Domestic violence. He already left." She stated that "he" was defendant and was her boyfriend. She told the dispatcher that defendant had hit her and left. She did not need an ambulance.

B. DOE'S TRIAL TESTIMONY

Doe testified differently at trial. Doe insisted that on June 11, she was upset with defendant because she had found photographs of other women on his cell phone. Doe secretly looked at his phone that morning while he was sleeping. She did not immediately confront defendant but throughout the morning she got more upset. She was mean to him but he ignored her. Doe never told the police about these photographs.

Doe got more upset and started yelling at defendant because of his infidelity. Defendant ignored her. She yelled at defendant in the bedroom in front of their children.

She denied that defendant threw anything at her while they were arguing about his infidelity. She did not recall telling Officer Thomas that he threw the shoe at her and hit her in the shoulder but that it did not leave a mark. She did not recall talking to Officer Thomas because she was "really dark, angry."

Doe did not recall telling Officer Thomas that defendant slapped her five times in the face. She did not recall telling Officer Thomas that defendant punched her one time in the face with a closed fist. She also did not recall telling Officer Thomas that defendant grabbed her by the hair and hit her. She did not recall stating she was on the ground when defendant was hitting and slapping her.

Doe never asked defendant to stop being violent with her; she asked him to stop cheating on her. The welt on her cheek was not caused that day by defendant hitting her: her two-year-old child had hit her on the cheek. She was crying that day when the police arrived because she was upset about defendant's infidelity. Her makeup was messed up because she had just gotten out of the shower in preparation for going to work.

Doe did not recall telling Officer Thomas that one of her children was sick and that she and defendant were arguing over giving the child medicine. She denied that her child was sick. She called the police so they would come to the house and check on them. She did not think about just leaving defendant.

Doe admitted that that she was crying during the 911 call. She insisted she was crying because she was angry. She was still angry about the photographs she had found earlier in the day. She denied she was trying to protect defendant or that she still loved him. She again denied that defendant ever hit her, pulled her hair, or threw a shoe at her.

Everything that she told the 911 operator was a lie. She wanted defendant to pay for his infidelity.

Doe wanted revenge, so she called the police. She now realized she should not have called the police. She never contacted the police after this incident to tell them that she had made a mistake; she was afraid she would get in trouble for filing a false police report.

C. TESTIMONY OF BWS EXPERT

Riverside County Sheriff's Detective Sylvia Perez had investigated over 100 domestic violence cases in which she spoke with both the victims and the perpetrators. She had previously testified as an expert on domestic violence issues. She knew nothing about the facts of the instant case.

Detective Perez explained that it was common for a victim to protect his or her abuser. There were many reasons including that the victim relied on the abuser for financial support, was threatened by the abuser, or feared repercussions such as deportation if he or she reported the abuse.

Detective Perez provided that a "power and control wheel" illustrated the tactics used by an abuser to control his or her victim. These include that the abuser threatened to commit suicide; threatened the victim with harm; intimidated the victim; displayed weapons; forced sex on the victim; and minimized his or her own behavior. If there were children in the relationship, the abuser would threaten to take them away from the victim. An abuser may withhold financial support. Although not all of these behaviors were present in every relationship involving domestic violence, they were common.

Detective Perez also explained the cycle of violence. First, there would be tension in the relationship. A victim may be "walking on eggshells" trying not to provoke his or her abuser. Second, there would be abuse, whether verbal or physical violence. Third, the victim and abuser would enter the honeymoon stage. This was oftentimes during trial where the victim realizes that she or he will no longer have financial or other support from the abuser. A victim at trial oftentimes recants the earlier statements made to police.

Detective Perez indicated that the cycle of violence mirrored what she had experienced in the field. She also indicated that in her experience, most incidents of domestic violence were not reported either out of love for the abuser or fear.

Detective Perez had been involved in approximately 20 cases in which the victim lied about the abuse. It was possible for a person to lie about the abuse in order to gain child custody or due to jealously about infidelity. Detective Perez assumed that the instant case involved domestic violence but she had no personal knowledge of the facts of the case.

DISCUSSION

A. LIMITING INSTRUCTION

Defendant contends, relying upon *People v. Housley* (1992) 6 Cal.App.4th 947 (*Housley*), that the trial court had a sua sponte duty to give a limiting instruction to the jury on the use of expert testimony on BWS. Specifically, the trial court refused to give CALCRIM No. 303, even though requested by the parties, and failed to give an

instruction similar to CALCRIM No. 850. We conclude that even if the trial court erred by failing to give the instructions, any error was harmless.

1. *ADDITIONAL FACTUAL BACKGROUND*

Prior to trial, the People submitted a brief requesting that they be allowed to call Detective Perez to testify as an expert about BWS. The testimony would include the power and control wheel, cycle of violence and how it was common for a victim of domestic abuse to avoid or delay reporting to law enforcement, or recant their initial statements in order to protect their abuser.

Defendant filed a motion to exclude any proposed expert testimony on BWS. Defendant insisted that although the People claimed it was only being admitted to explain the inconsistencies in Doe's testimony, it presupposed that the abuse had occurred. Evidence Code section 1107, subdivision (a) prohibits and excludes this type of expert testimony, which is offered to prove the occurrence of the acts of abuse. Further, it was not admissible unless it was established that Doe was in fact suffering from BWS. Such proposed testimony also was more prejudicial than probative pursuant to Evidence Code section 352.

The trial court reviewed the documents. Defendant argued at the hearing that in order to introduce such evidence, the People had to first lay the foundation that Doe actually suffered from BWS. Otherwise, it was merely assumed that she suffered from BWS. The People stated that Detective Perez would not opine that Doe suffered from BWS. The trial court recognized that Doe would have to testify differently from her statements to the police or minimize the conduct before this evidence could be admitted.

If she did that, the expert could testify not to the fact that the abuse occurred, but that BWS can cause recantation and minimization of conduct. Detective Perez's testimony was introduced as set forth, *ante*.

The trial court and the parties discussed the jury instructions off the record. The only objection by defense counsel on the record was to the instruction on motive. The clerk's transcript includes CALCRIM No. 303 and that it was requested by both parties. It was refused by the trial court.

The jury was instructed on expert witness testimony pursuant to CALCRIM No. 332. It instructed, "A witness was allowed to testify as an expert and to give opinions. You must consider the opinions, but are not required to accept them as true and correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate. You may disregard any opinion you find to be unbelievable, unreasonable, or unsupported by the evidence. [¶] An expert witness may be asked hypothetical questions. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based upon the assumed facts. It is up to you to decide whether the assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion."

2. *SUA SPONTE INSTRUCTION*

Defendant complains that the jury was not instructed—although requested by both parties—with the limiting instruction in CALCRIM No. 303. He further insists the trial court should have modified CALCRIM Nos. 303 or No. 332 to add, " 'You heard expert testimony about the effects of "[BWS]." You may consider this testimony and give whatever weight you believe this testimony warrants for [Doe]'s beliefs, perceptions and behavior. You may not consider this testimony in deciding whether the alleged acts by the defendant actually occurred.' "

"[Evidence Code s]ection 801, subdivision (a), permits expert testimony on subjects 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' [Evidence Code s]ection 1107, subdivision (a), provides: 'In a criminal action, expert testimony is admissible by either the prosecution or the defense regarding intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge.' " (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 898 (*Kovacich*).)

"'[E]xpert testimony [like the testimony here on BWS] may be used to disabuse the jury of commonly held misconceptions regarding the behavior of abuse victims.' " (*Housley*, *supra*, 6 Cal.App.4th at p. 957; see also *Kovacich*, *supra*, 201 Cal.App.4th at p. 902.) There is a dispute as to whether an instruction, like the one in CALCRIM No. 850, *post*, is required to be given sua sponte when such testimony is admitted.

Defendant does not cite to CALCRIM No. 850; however, it mirrors the instruction that defendant suggests should have been given and it provides, "You have heard testimony from <*insert name of expert*> regarding the effect of (battered women's syndrome/intimate partner battering/<*insert other description used by expert for syndrome*>). [¶] <*insert name of expert*>'s testimony about (battered women's syndrome/intimate partner battering/<*insert other description used by expert for syndrome*>) is not evidence that the defendant committed any of the crimes charged against (him/her). [¶] You may consider this evidence only in deciding whether or not <*insert name of alleged victim of abuse*>'s conduct was not inconsistent with the conduct of someone who has been abused, and in evaluating the believability of (his/her) testimony."

The bench notes to the 2017 revision of CALCRIM No. 850 provide that several courts have found in cases involving child sexual abuse accommodation syndrome (CSAAS) that the limiting instruction need not be given sua sponte, citing, among other cases, to *People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 (*Mateo*) and *People v. Humphrey* (1996) 13 Cal.4th 1073, 1088, fn. 5, which both conclude that a limiting instruction on BWS is required only on request. It also notes *Housley*, *supra*, 6 Cal.App.4th at pp. 958-959, which did find a sua sponte duty to give a limiting instruction when CSAAS evidence was admitted.

We need not determine if the trial court had a sua sponte duty to give CALCRIM No. 850 because we conclude any failure to give such an instruction was harmless. Moreover, while we recognize that the trial court did not have a sua sponte duty to give

CALCRIM No. 303, once requested, the trial court should have given the instruction. (Evid. Code, § 355; see also *People v. Simms* (1970) 10 Cal.App.3d 299, 311.) CALCRIM No. 303 provides, "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other." The record does not establish why the trial court denied the request of both parties. However, we need not consider the issue further as we conclude the failure to give CALCRIM No. 303 was also harmless.

3. *HARMLESS ERROR*

Even if the trial court erred by failing to give an instruction similar to CALCRIM No. 850, and by refusing to give CALCRIM No. 303, we "cannot conclude . . . it is reasonably probable a verdict more favorable to [defendant] would have resulted had [Detective Perez's] testimony been properly limited." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 392.) Here, any error is considered pursuant to the harmless standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *Mateo*, *supra*, 243 Cal.App.4th at p. 1074 [even assuming court erred in failing to give limiting instruction on CSAAS the error was harmless under the standard set forth in *Watson*]; *People v. Housley*, *supra*, 6 Cal.App.4th at p. 959 [it was not reasonably probable defendant would have received a more favorable verdict if appropriate limiting instruction had been given].) "[C]laims of instructional error are examined based on a review of the instructions as a whole in light of the entire record." (*People v. Lucas* (2014) 60 Cal.4th 153, 282, overruled on other grounds by *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1258.)

Defendant insists the error is reviewed under *Chapman v California* (1967) 386 U.S. 18, 24. "An instructional error that relieves the prosecution of the burden of proving beyond a reasonable doubt each essential element of the charged offense, or that improperly describes or omits an element of an offense, violates the defendant's rights under both the United States and California Constitutions, and is subject to *Chapman* review." (*People v. Larsen* (2012) 205 Cal.App.4th 810, 829.) Here, the omission of these instructions did not remove defendant's defense from the jury's consideration and did not incorrectly define the intent element. We review harmless error under the standard of *Watson.*

Here, there is no dispute on appeal that Detective Perez's testimony was properly admitted. Detective Perez never testified that she knew defendant or Doe, or anything about their relationship. The prosecutor advised the jurors that there was no evidence the cycle of violence or power and control wheel were present in this case. The prosecutor also advised the jurors it was up to them to consider Doe's credibility. When an expert testifies regarding the behavior of persons "as a class, there is little, if any, chance the jury will misunderstand or misapply the evidence." (*Mateo*, *supra*, 243 Cal.App.4th at p. 1074.)

The jury was advised as to how to approach the expert witness testimony in CALCRIM No. 332, including that it could find her opinion was unbelievable, unreasonable, or unsupported by the evidence. Further, the jury was advised it was up to the jury to determine that the assumed fact—that Doe and defendant were involved in a domestic violence relationship—was true. The jury could completely disregard the

expert opinion if it rejected that Doe and defendant were in a domestic violence relationship.

This was highly unlikely. Doe had told Officer Thomas that defendant had hit her at least five times prior to this incident. She only reported one of the incidents. She told Officer Thomas she wanted to prosecute because it had happened too many times and defendant was not going to stop. With this instruction, the jury was advised it must first determine whether there was domestic violence in defendant and Doe's relationship and that the jury could not assume such violence. The jury likely concluded that the relationship involved domestic violence and would have done so even if given the limiting instructions.

Moreover, the evidence that Doe was telling the truth right after the incident was more compelling than her trial testimony. When Officer Thomas arrived, Doe was upset and crying. The jury heard her taped conversation with Officer Thomas. Doe demonstrated how defendant punched her in the face and that she had to ward off his blows. She described in detail the abuse she suffered, including being slapped in the face and having her hair pulled.

Doe's excuse at trial for her change in testimony was that she was jealous and therefore "dark [and] angry." However, she admitted that she did not immediately confront defendant when she found the photographs on his phone. Further, she never contacted the police prior to trial to advise them that she had lied about the abuse. The jury heard Doe tell Officer Thomas that this had occurred in the past and she had not reported the abuse. This evidence supported the jury's determination that Doe was telling

the truth to Officer Thomas and the 911 operator. To the extent it also relied on Detective Perez's testimony, it was not prejudicial because the above evidence "likely . . . yielded the same conclusion." (*Kovacich*, *supra*, 201 Cal.App.4th at p. 903.)

The prosecutor encouraged the jury in closing argument that it look to all of the evidence. The entirety of the evidence supported that Doe was telling the truth prior to her trial testimony; the failure to give a limiting instruction on Detective Perez's testimony was not prejudicial.

DISPOSITION

The judgment is affirmed in full.

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MILLER
J.

We concur:

McKINSTER
Acting P. J.

SLOUGH
J.